Volume 11, Issue 3 Spring 2015

American Bar Association
Section of Antitrust Law
Business Torts & Civil RICO Committee

BUSINESS TORTS & RICO NEWS

Inside this issue:

A Primer on the Muddle Over RICO's Extraterritoriality

By Melvin L. Otey [1]

RICO, with its provision for treble damages and attorney's fees, is an attractive tool for plaintiffs.[2] The statute has been described as "an unusually potent weapon—the litigation equivalent of a thermonuclear device."[3] Rather predictably, as civil litigation involving foreign figures, entities, and activities has grown with advances in globalization, plaintiffs have increasingly attempted to deploy the statute in ac-

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Ehret v. Uber and California's Competition and Consumer Remedies Laws

By Nate Asher [1]

Since its founding in 2009, Uber has expanded rapidly, now operating in more than 250 cities around the world, with a valuation exceeding $40 billion. As the company has grown, it has also faced more legal exposure. Uber is now litigating a case in California involving the state's Unfair Competition Law ("UCL") and Consumer Legal Remedies Act ("CLRA"). This case, *Ehret v. Uber Technologies,*

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Business Torts & RICO News is published four times a year by the American Bar Association Section of Antitrust Law Business Torts & Civil RICO Committee. The views expressed in Business Torts & RICO News are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law, or the Business Torts & Civil RICO Committee (or its subcommittees). If you wish to comment on the contents of Business Torts & RICO News, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654.

FROM THE CHAIR . . .

Welcome to the latest edition of the Business Torts and Civil RICO Newsletter. Our Committee has been very active and we have a number of items to report.

First, a big thanks to Angelo Russo, the editorial staff, and our authors for another fantastic newsletter. In this quarter's newsletter, you can read a primer on the extraterritorial application of RICO, delve into the details of a case filed against Uber Technologies in California, and learn about effective methods of using sanctions in defense of civil RICO claims.

Second, if you haven't been dialing into the Business Torts and Civil RICO committee's programs, you have been missing out. Over the last three months, we have had four excellent programs, covering the following topics:

- Cross-Border Business Torts: Canadian and U.S. Issues and Developments (January 29, 2015);
- RICO in Health Care Industries: Recent Developments in Civil Litigation and Criminal Enforcement (February 19, 2015);
- Bringing Value to Trade Association Clients: A Primer for Junior Lawyers (March 25, 2015); and
- From High-Tech Labor to Sandwich Artists: The Law and Economics of Employee Solicitation and Hiring (March 25, 2015).

We also hosted our committee's telephonic town hall on March 20, 2015, where we highlighted ways for our members to get involved. If you were unable to join any of these programs due to scheduling conflicts, download the audio file on the ABA Antitrust Section's website.

Finally, the 63rd Annual Antitrust Section Spring Meeting is just around the corner (April 15-17, 2015). Mark your calendars for the Welcome Reception on Wednesday, April 15th (5:00-6:00pm). The Committee leadership will be hosting a table and this is a terrific opportunity to come by, sign up, and get more involved. We are also co-sponsoring what we expect to be two great programs: "What the Heck, Write a Check: Managing Discovery Costs" (April 15 at 3:30-5:00pm) and "Don't Guess at Ethics" (April 15 at 8:30-10:30am). We look forward to connecting with you at this year's Spring Meeting.

Matthew D. Kent
Chair, Business Torts and Civil RICO Committee
Section of Antitrust Law
American Bar Association

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tions with multinational dimensions. Given this context, it is noteworthy that the framework for determining RICO's extraterritorial reach remains unsettled.

After several decades of "disregard" for the longstanding presumption against extraterritoriality among the circuit courts of appeals, the U.S. Supreme Court clarified the extraterritorial landscape with its seminal decision in *Morrison v. National Australia Bank, Ltd.*[4] There, the Court determined that challenges to the extraterritorial reach of federal statutes are merits rather than jurisdictional questions[5] and employed a two-part test for determining the appropriate reach. First, absent a clear indication to the contrary, a statute is presumed to have no extraterritorial application.[6] Second, where the presumption applies, domestic activity relating to otherwise extraterritorial conduct falls within a statute's purview only when the domestic conduct is within the "focus" of congressional concern.[7]

While *Morrison* may have provided the requisite clarity about extraterritoriality in securities cases (it directly addressed the application of § 10(b) of the Securities Exchange Act of 1934),[8] it has had an unsettling effect in RICO litigation. In the absence of further guidance, lower courts have inconsistently applied RICO in cases involving varying combinations of foreign and domestic activity and actors. In fact, the post-*Morrison* jurisprudence regarding RICO's extraterritorial reach resembles a compound fracture more than a split. Most courts have concluded that the statute is silent regarding extraterritorial application,[9] so the confusion chiefly surrounds the second prong of the *Morrison* analysis. More precisely, courts are settling into two camps regarding the "focus" of congressional concern (one emphasizing the enterprise and the other emphasizing the pattern of racketeering) and courts within each of those two camps have utilized distinct approaches that can produce disparate results on similar facts.

The U.S. Court of Appeals for the Tenth Circuit recently noted this unsettled state of affairs in *CGC Holding Co., LLC v. Hutchens*.[10] While the court declined to align itself with either camp at present (because the issue was raised on an interlocutory appeal and had not been decided by the district court), it asserted, "[T]he plain language of the legislation does not provide a conspicuous answer to which approach Congress favored" and opined that neither of the approaches is "unimpeachable."[11] Still, the Tenth Circuit indicated its readiness to wade into these extraterritorial waters once the proceedings below are finally resolved.[12] This signal, along with the significance of the question in an increasingly transnational climate, makes this an opportune time to survey the current landscape regarding RICO's extraterritorial reach.

The Enterprise Focus Camp

Several district courts have concluded that congressional focus in enacting the RICO statute was on the enterprise.[13] Determining the situs of the enterprise is not always a simple task,[14] however, and courts relying on enterprise-focused models have not followed a common blueprint for doing so. In determining whether an enterprise was foreign or domestic, a couple of district courts have used the "nerve center," or "brains," test employed by the Supreme Court in *Hertz Corp. v. Friend*[15] to determine a corporation's principal place of business for purposes of determining federal diversity jurisdiction.[16] After determining that this test was unsatisfactory where the alleged enterprise's decision-making occurred in multiple countries, at least one district court elected to apply a "brawn" test instead, and designated the enterprise's situs based on the location of the defendants' corporate activity.[17]

The "Nerve Center" Test

The district court's approach in *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*[18] illustrates the nerve center test. Mitsui, a Japanese ocean-shipping corporation, alleged that the defendant American trucking companies routinely and fraudulently induced it to pay for unnecessary or nonexistent inland shipments. Aspects of the alleged conduct, including use of postal mail, faxes, and the Internet to communicate with and bill the plaintiff, occurred in both China and the United States. This activity constituted the alleged wire and mail fraud predicates in Mitsui's RICO and RICO conspiracy claims.[19]

In adopting the nerve center test, the court described it as a "familiar, consistent, and administrable method for determining the territoriality of RICO enterprises such as the one at bar, which blend domestic and foreign elements."[20] The court declined to dismiss Mitsui's racketeering claims because the defendant trucking companies were domestic corporations and had arranged the allegedly fraudulent shipments in the United States.[21] In short, its "brains" were domestic.[22] Notably, the court also suggested the claims were potentially viable even if the majority of the alleged conduct occurred in China so long as the enterprise was domestic.[23]

The Tenth Circuit seemingly agreed with the district court in *Mitsui* that the nerve center test fosters administrative ease and consistency.[24] While ease and consistency are laudable goals, the assertion may be slightly exaggerated. At the least, it is subject to qualification. Corporations today are often simultaneously present in multiple countries,[25] and it can be difficult to identify the nerve center where the corporation in question does not have a single center of corporate policy.[26] In fact, the Tenth Circuit acknowledged that other courts have noted the potential complications involved with pinpointing an enterprise's "home base" in some instances.[27]

The "Brawn" Test

The court's reasoning in *In re LIBOR-Based Financial Instruments Antitrust Litigation*[28] acknowledges the limits of the nerve center test in RICO litigation and offers an alternative. There, the defendant banks and affiliates allegedly conspired to manipulate the London InterBank Offered Rate ("LIBOR") disseminated by the British Bankers' Association (the "BBA") and submitted artificial rates over the course of nearly three years. Plaintiffs were allegedly injured because they held positions in various financial instruments that were negatively affected by the defendants' suppression of this benchmark interest rate.[29] The claims included RICO and RICO conspiracy, but the court determined both were barred because, among other things, they involved impermissible extraterritorial application of the RICO statute.[30]

In reaching this conclusion, the district court declined to use the nerve center test because "[t]he decisionmaking of the alleged enterprise likely occurred in several different countries, and might even have been located in each of the countries in which a defendant was headquartered."[31] Rather, it focused on the "brawn," or activity, of the alleged enterprise.[32] Because the defendants submitted the allegedly false rate quotes from their various nations to the BBA, an entity located in England, and participated in the BBA's affairs by submitting the quotes each day, the court concluded, "[T]he most sensible place to locate the RICO enterprise is England."[33]

Whether the location is determined based on an alleged enterprise's brains or its brawn, the enterprise-based model can produce absurd results.[34] Consider, for example, two hypothetical companies, one domestic and one foreign. Both engaged in substantial business in the United States with members and associates conducting their affairs through a pattern of racketeering in the United States to the injury of the American public. Under enterprise focus models, officials of the former would be subject to RICO's sanctions while employees and associates of the latter would likely be immune so long as the brains or brawn tests did not locate the enterprise domestically.[35] In seizing upon this logical and necessary consequence of the enterprise focus determination, some have predictably advocated this precise result in order to insulate foreign clients from liability without regard to the extent of their domestic dealings.[36] Yet, several courts have expressly rejected this proposition as untenable.[37]

The Pattern Focus Camp

The alternative approach, adopted by most courts addressing the question of RICO's focus post-*Morrison*, identifies the pattern of racketeering as its focus.[38] The U.S. Courts of Appeals for the Ninth and Second Circuits, the only federal appellate courts to rule on the issue to date, have taken this position,[39] and it seems most consistent with the Supreme Court's pre-*Morrison* jurisprudence in which the Court described the pattern of racketeering as "the heart of any RICO complaint"[40] and "RICO's key requirement."[41] However, while the Ninth and Second Circuits agree that RICO's focus is on the pattern of racketeering (and this hopefully suggests the scope of judicial variance is narrowing), they have taken contrasting approaches in determining the extent to which an alleged pattern of racketeering can reach foreign actors and activities; the Ninth Circuit depended wholly on geography while the Second Circuit relied on an analysis of the underlying predicates.

The Ninth Circuit's Approach

The Ninth Circuit addressed RICO's extraterritorial reach in *United States v. Chao Fan Xu*.[42] There, the defendants, Chinese nationals who defrauded the Bank of China out of hundreds of millions of dollars, committed immigration fraud in the course of absconding to the United States, and spent the pilfered funds in, among other places, Las Vegas casinos. The court found that the enterprise had two parts, one consisting of "racketeering activities conducted predominantly in China" and the other consisting of "racketeering activities in the United States."[43] While this distinction seems to improperly conflate the enterprise and pattern elements,[44] it provides an important window into the court's reasoning.

This bisection allowed the Ninth Circuit to distinguish its treatment of the defendants' conduct based solely on the locus of their activities. Regarding the fraud perpetrated in China against the Bank of China, the court concluded, "[T]o the extent it was predicated on extraterritorial activity, it is beyond the reach of RICO even if the bank fraud resulted in some of the money reaching the United States."[45] The conduct within the territorial United States, however, including violations of America's immigration laws, was deemed properly subject to the government's RICO charges.[46]

The court's analysis included no discussion of the reach of the predicate statutes themselves, and it did not actually apply RICO to any extraterritorial conduct.[47] Rather, it focused on violations of American laws while the defendants were situated within the territorial United States.[48] This ultimately produced an antithetical result that highlights the principal shortcoming inherent in its approach; the court held that the alleged money laundering predicates were untenable because they were "predicated on extraterritorial conduct,"[49] but upheld stand-alone convictions for the very same conduct.[50]

The Second Circuit's Approach

After several years of turmoil, which included conflicting approaches and dicta among its district courts, the Second Circuit finally settled on its approach to RICO's extraterritorial application in *European Community v. RJR Nabisco, Inc*.[51] There, executives and employees of RJR Nabisco allegedly shipped cigarettes through Panama in order to shield the transactions from government scrutiny; traveled extensively from the United States to various international destinations; bribed border guards to enter Colombia illegally; wired funds internationally into the United States; communicated with coconspirators via U.S. interstate and international mail and wires; and filed large volumes of fraudulent Customs and ATF documents.[52]

Like the Ninth Circuit, the Second Circuit declined to treat RICO's applicability as an all-or-nothing proposition. However, it segregated its treatment based on the extraterritorial reach of the individual alleged predicates rather than the locus of the discrete activities. In rejecting a situs-based approach, the Second Circuit explained, "We think it far more reasonable to make the extraterritorial application of RICO coextensive with the extraterritorial application of the relevant predicate statutes."[53] Under this coextensive framework, liability could attach in a racketeering claim to the same extent it could attach under the predicates outside of a racketeering claim.[54]

The practical difference between the Second and Ninth Circuit approaches is exemplified by their respective recognitions of the reach of the federal money laundering statute. The money laundering statute expressly applies extraterritorially if "(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000."[55] Under the Second Circuit's "coextensive with the predicate acts" approach, defendants associated with foreign enterprises would potentially be liable under RICO for a pattern of racketeering involving extraterritorial money laundering acts. The Ninth Circuit, however, came to precisely the opposite conclusion in *Chao Fan Xu*.

While briefly discussing the "predicate acts approach" (without discussing the Second Circuit's decision in *RJR Nabisco*), the Tenth Circuit lamented the lack of an obvious limiting principle attending an emphasis on predicate acts "even when the enterprise, victims, and schemes are almost completely foreign."[56] This criticism echoes an earlier expressed concern that focusing on the alleged racketeering conduct "invites courts to adopt a 'know-it-when-they-see-it' approach to territoriality, with predictably unpredictable results."[57] However, the ostensible limit on RICO's extraterritorial application under the Second Circuit's framework is the individual limits inherent in its incorporated predicates.

Concluding Observations

Until greater clarity and consistency develops, those litigating RICO claims with extraterritorial tentacles are navigating uncertain waters, and it is prudent to proceed cautiously. Those litigating such claims in the Second and Ninth Circuits will obviously need to conform their pleadings, arguments, and proof to the guidance provided by their respective courts of appeals. In the absence of further direction, though, plaintiffs' counsel in other circuits should plead and prove that enterprises both make relevant decisions and take critical actions domestically. Moreover, to the extent one can credibly do so, it is important to argue that alleged predicates could independently reach the extraterritorial activity at issue. Conversely, defense counsel should be wary of relying exclusively or principally on arguments that foreign-based clients are insulated from liability solely because of their foreign character; such a defense can be asserted in good faith, but it is still expedient to analyze the actual limits of the alleged predicates and their independent abilities to reach the conduct at issue. A demonstration that they could not reach the conduct independently could be a compelling defense to allowing them to reach it in a RICO claim.

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[1] Melvin L. Otey is an Associate Professor of Law at Faulkner University's Thomas Goode Jones School of Law.
[2] *See* 18 U.S.C. § 1964(c) (2012).
[3] *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991).
[4] 561 U.S. 247 (2010).
[5] *Morrison*, 561 U.S. at 254.
[6] *Id.* at 255; *In re LIBOR-Based Fin. Instruments Antitrust Litig*., 935 F. Supp. 2d 666, 695-96 (S.D.N.Y. 2013).
[7] *Morrison*, 561 U.S. at 267-69; *CGC Holding Co., LLC v. Hutchens,* 773 F.3d 1076, 1097 (10th Cir. 2014) ("To understand whether an extraterritorial obstacle exists, the

Supreme Court tells us to consider Congress's 'focus' in enacting the examined legislation.").

[8] *See, e.g.*, *U.S. v. Georgiou*, 777 F.3d 125, 133-34 (3d Cir. 2015) ("The Supreme Court has limited the application of Section 10(b) to actors who employ 'manipulative or deceptive device[s]' in two contexts: (1) transactions involving 'the purchase or sale of a security listed on an American stock exchange,' and (2) transactions involving 'the purchase or sale of any other security in the United States.'"). *But see United States v. Vilar*, 729 F.3d 62, 72 (2d Cir. 2013) ("Despite the supposed bright-line nature of *Morrison*'s holding, there has been no shortage of questions raised in its wake.").

[9] *See, e.g.*, *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32-33 (2d Cir. 2010).

[10] 773 F.3d 1076 (10th Cir. 2014).

[11] *CGC Holding Co., LLC*, 773 F.3d at 1097-98.

[12] *Id.* at 1098 ("In the end, notwithstanding the parties' attention to this issue, we need not resolve finally which approach is preferred in the circuit. On this interlocutory appeal, we do not decide the merits of plaintiffs' claims, including the extent to which those claims involve an extraterritorial application of RICO. Since the question of the extraterritoriality of a statute is a merits question, resolving it must await a final disposition from the court below.").

[13] *See, e.g.*, *In re Le-Nature's, Inc. v. Krones, Inc*., No. 9-1445, 2011 U.S. Dist. LEXIS 56682 (W.D. Pa. May 26, 2011).

[14] *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933, 938-39 (N.D. Cal. 2012) ("The challenge of applying *Morrison* in RICO cases stems from the difficulty of ascertaining where a RICO enterprise is located. This difficulty was not present in the securities context from which *Morrison* arose.").

[15] 559 U.S. 77, 80-81 (2010).

[16] *See, e.g.*, *European Cmty. v. RJR Nabisco, Inc*., 764 F.3d 129 (2d Cir. 2014).

[17] *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 734 (S.D.N.Y. 2013).

[18] 871 F. Supp. 2d 933 (N.D. Cal. 2012).

[19] *Mitsui*, 871 F. Supp. 2d at 935-36.

[20] *Id.* at 940.

[21] *Id.* at 942-44.

[22] *Id.* at 942-43.

[23] *Id.* at 943.

[24] *CGC Holding Co., LLC*, 773 F.3d at 1097.

[25] *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659, 1669 (2013).

[26] *Mitsui O.S.K. Lines, Ltd.*, 871 F. Supp. 2d at 935-36 (referring to "artificially simplified results" that will sometimes attend the "nerve center" test); *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 243 (S.D.N.Y. 2012) ("Moreover, citizenship or legal characteristics would afford no reliable or principled basis for characterizing association-in-fact enterprises consisting of citizens or entities organized under the laws of different countries.").

[27] *CGC Holding Co., LLC*, 773 F.3d at 1098.

[28] 935 F. Supp. 2d 666 (S.D.N.Y. 2013).

[29] *Id. at* 677-78.

[30] *Id.* at 725, 731.

[31] *Id.* at 725, 733.

[32] *Id.*

[33] *Id.* at 725, 734.

[34] *See United States v. Chao Fan Xu*, 706 F.3d 965, 977 (9th Cir. 2013) ("The case before us . . . illuminates the inadequacy of the nerve center test and the enterprise-based model upon which it relies"); *Chevron Corp.*, 871 F. Supp. 2d at 242.

[35] *See Chevron Corp.*, 871 F. Supp. 2d at 243.

[36] *See, e.g.*, Lorrie L. Hargrove, Edward S. Sledge, IV & Katie M. Kimbrell, *The Extraterritorial Defense: A Border to RICO Claims Arising from International Transactions*, 81 DEF. COUNS. J. 47, 55 (2014) ("If the alleged enterprise is primarily foreign, then a defendant should make a motion to dismiss the RICO claim."); *but see Alfadda v. Fenn*, 935 F.2d 475, 479 (2d Cir. 1991) ("The mere fact that the corporate defendants are foreign entities does not immunize them from the reach of RICO").

[37] *Chao Fan Xu*, 706 F.3d at 977; *Chevron Corp.*, 871 F. Supp. 2d at 262; *Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants, S.R.L.*, 817 F. Supp. 326, 332 (E.D.N.Y. 1993).

[38] *See, e.g.*, *Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 165 (D.D.C. 2013); *Borich v. BP, P.L.C.*, 904 F. Supp. 2d 855, 861 (N.D. Ill. 2012).

[39] *See Chao Fan Xu*, 706 F.3d 965; *RJR Nabisco, Inc*., 764 F.3d 129.

[40] *Agency Holding Corp. v. Malley-Duff & Assocs*., 483 U.S. 143, 154 (1987).

[41] *H.J. Inc. v. Nw. Bell Tel.*, 492 U.S. 229, 236 (1989).

[42] 706 F.3d 965.

[43] *Id.* at 978.

[44] *See United States v. Turkette*, 452 U.S. 576, 583 (1981) ("The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government."); *United States v. Tipton*, 90 F.3d 861, 887-88 (4th Cir. 1996).

[45] *Chao Fan Xu*, 706 F.3d at 978.

[46] *Id.*

[47] *Id.* at 979.

[48] *Id.* at 978.

[49] *Id.* at 979 n.2 ("It was constitutional error for the jury to be instructed on the first part of the second superseding indictment, to the extent that this part of the indictment was predicated on extraterritorial activity that is not a basis for RICO liability. However, the error was harmless beyond a reasonable doubt as the 'evidence was overwhelm-

ing' as to the second part of the second superseding indictment, and the jury would have convicted on the basis of that evidence alone.") (citations omitted).

[50] *Id.* at 978-82.

[51] 764 F.3d 129.

[52] *Id.* at 133-34.

[53] *Id.* at 139.

[54] *Id*. at 136.

[55] *See* 18 U.S.C. § 1956(f) (2012).

[56] *CGC Holding Co., LLC*, 773 F.3d at 1100.

[57] *Mitsui O.S.K. Lines, Ltd.*, 871 F. Supp. 2d at 943.

(Continued from page 1)

Inc.,[2] offers several lessons to defendants facing UCL and CLRA claims and highlights certain obstacles they face when moving to dismiss those claims. The case reveals, for example, the focus of the UCL's territorial analysis, and shows how plaintiffs may establish economic injury through counterfactual pleading. After the plaintiff survived a motion to dismiss, the case is now headed to alternative dispute resolution.

Background

Ehret arises from a September 2012 taxi ride in Chicago that plaintiff Caren Ehret arranged through Uber's software application, or "app."[3] Ehret alleges that she relied on a representation by Uber that a 20% charge would be added to her fare as a gratuity for the driver.[4] In reality, according to Ehret, Uber kept some of that additional charge for itself, and Ehret alleges that had she known that, she would not have agreed to pay the full charge to Uber (even though paying less than the full charge may not have been possible through Uber's app).[5] Ehret filed suit on behalf of herself and all others similarly situated in California federal court, arguing that the alleged misrepresentation originated from Uber's California headquarters.[6]

Ehret's lawsuit, filed on January 8, 2014, was not the first time Uber faced a putative class action based on its language about a 20% charge added to a rider's fare. In 2013, two Uber drivers, as proposed representatives of a plaintiff class, filed a lawsuit alleging that Uber deprived its drivers of the full 20% gratuity that it represented it would pay them.[7] The plaintiffs survived a motion to dismiss and a summary judgment motion, but over the course of the case, the court has winnowed the plaintiffs' claims down to (1) a dispute over whether the plaintiffs are employees or independent contractors, and (2) demands for the full payment of the gratuity.[8]

The Alleged Misrepresentation

According to Ehret, when she took her Uber ride in 2012, the company's website said that Uber "automatically charge[s] your credit card the metered fare + 20% gratuity."[9] Additionally, the text on Uber's app allegedly said that a 20% gratuity would be added to the rider's metered fare.[10] Ehret alleges that despite these representations, Uber kept "a substantial portion" of the 20% charge "for itself."[11] Her complaint asserts that the representation was intended to make the rider think that the full 20% would be allotted to the driver, because if the fee was additional money going to Uber, it would not have been a "gratuity."[12]

The UCL and CLRA

California's UCL[13] has three prongs, imposing liability for business activity that is unfair, unlawful, and/or fraudulent.[14] The UCL's purpose "is to protect consumers as well as competitors by promoting fair competition for goods and services in commercial markets."[15] To have standing to bring a UCL claim, a plaintiff must establish economic injury and must show that the injury was caused by the alleged unfair business practice.[16] The CLRA applies to consumer transactions involving the sale or lease of goods or services and prohibits 24 specific practices.[17] Given their breadth, both laws are commonly invoked in civil litigation in California.

Each prong of the UCL involves a different standard of liability:

- Unfair business practices are those that violate "established public policy" or are "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."[18] When weighing the fairness of a practice, courts also consider the practice's impact on the plaintiff against the reasons for the conduct.[19]

- Unlawful acts are those that "can properly be called . . . business practice[s] and that at the same time [are] forbidden by law."[20] This prong borrows from violations of other laws.[21]

- Fraudulent acts are those that are likely to deceive reasonable members of the public.[22] Although in other areas of the law, claims of fraud may require alleging intent or the plaintiff's reliance, the UCL fraud prong requires no such allegations.

Ehret's UCL and CLRA Claims

Ehret alleges three UCL claims, one for each prong of the statute. Her unfair practice claim essentially recites the standards discussed above, which have been established through case law.[23] As for unlawful conduct, Ehret alleges that Uber's representation runs afoul of California Civil Codes prohibiting fraud, deceit, and misleading advertising.[24] Her fraudulent practice UCL claim alleges that reasonable consumers are likely to have been deceived by Uber's representation about the gratuity.[25]

Ehret also alleges one claim for violation of the CLRA, asserting that Uber's representation is consistent with five of the CLRA's prohibited business practices, such as advertising characteristics of a service that the service lacks.[26]

Uber's Motion to Dismiss

Uber moved to dismiss Ehret's complaint in its entirety, relying heavily on a California UCL case where a hotel patron alleged that she was unaware that a 17% service charge added to her room service bill went to the server, so she tipped the server separately.[27] The California appellate court affirmed an order sustaining the hotel's demurrer, holding that (1) the hotel did not deceive guests—who are free to order food from wherever they please—about costs of room service, and (2) guests have no interest in how the hotel allocates its service charge.[28] Uber argued that *Searle* precluded Ehret's UCL and CLRA claims because Ehret was never deceived about the total cost of her ride, and she was free to choose another car service knowing the full costs.[29] Moreover, Uber is free to allocate the 20% charge as it sees fit, and Ehret has no legitimate interest in how much of the 20% fee actually goes to drivers.[30]

Additionally, Uber argued that Ehret fails to satisfy Rule 9(b)'s particularity requirements; although she does not assert fraud claims, the facts that she alleges would constitute fraud.[31] According to Uber, Ehret also lacks standing for a UCL claim because she never suffered an economic injury. Ehret was informed of the 20% charge ahead of time, and that was what she paid.[32] (Uber advanced a similar argument, based on the lack of damages, in urging dismissal of the CLRA claim.[33])

Uber also argued that the UCL and CLRA do not apply outside California. Consequently, Uber claimed that Ehret, who is an Illinois citizen, and who used Uber's app in Chicago to book a ride in Chicago, should not be allowed to pursue claims under California's UCL and CLRA simply because Uber is headquartered in San Francisco.[34]

As for the CLRA, Uber asserted that it never misrepresented or falsely advertised the service that it would provide to Ehret, which was the arrangement of and payment for transportation at a disclosed price.[35] According to Uber, Ehret's other CLRA claims lacked facts linking Uber's representation to the cited CLRA provisions. For example, Ehret cited a CLRA provision addressing price reductions but pled no facts about price reductions.[36]

District Court Ruling

The district court denied Uber's motion in part and granted it in part. First, the court held that Ehret pled her claims with adequate specificity, declining to require Ehret to plead "the precise web pages viewed and the precise date she viewed the representation."[37] Although not the first time a court has adopted this stance,[38] this holding eases the burden on plaintiffs pleading UCL claims based on representations made on websites or apps, an area of litigation that will almost inevitably become more commonplace in the future.

Next, the court explained that permitting Ehret to pursue her UCL and CLRA claims would not run afoul of the presumption against extraterritorial application of those statutes. Although Ehret was in Illinois, she alleges that the representation at the center of her complaint "emanated from California."[39] The UCL is focused on the defendant's conduct, rather than where the plaintiff was allegedly harmed. This standard poses a significant obstacle to California-based defendants hoping to escape UCL and CLRA claims in cases involving transactions outside California.

As for standing, the court held that Ehret satisfied the requirement to plead economic injury by alleging that she "'would not have agreed to or paid Uber the full amount that Uber charged her and that she paid to Uber.'"[40] Thus, she pled that she surrendered more in the transaction than she otherwise would have, which satisfies the UCL's economic injury requirement.[41] Uber had argued that the 20% fee was unavoidable, so Ehret would not have had the option to pay less than 20% if she was using Uber, but the court found that "immaterial."[42] The court cited other cases involving seemingly unavoidable fees and relied on the "longstanding rule that under the UCL even a mandatory charge can be deceptive if it is labeled as something it is not."[43] Rather than requiring Ehret to plead that she would have used a different car service, it was sufficient for her to allege that she would not have paid the full charge, even if the full charge was mandatory.[44]

This holding poses yet another obstacle to defendants in UCL cases: a plaintiff can survive a motion to dismiss by relying on pleadings that are seemingly impossible. Ehret never had the option to pay less than the full fare plus the 20% fee, yet she alleges that this is precisely what she would have done had she known how Uber applied the fee. As the court noted, though, crediting this type of pleading avoids perverse outcomes by finding economic injury even where a plaintiff still would have proceeded with a transaction knowing the truth, albeit at a different price.[45]

Turning to Uber's reliance on *Searle*, the court held that the case was distinguishable because the hotel in *Searle* made no representation about the nature of its 17% service charge or how it would be allocated.[46] Ehret's complaint, on the other hand, alleges that Uber represented that it was adding a 20% charge for the purpose of paying the driver a gratuity when, in fact, some of that charge was applied elsewhere.[47] The court also held that Uber's representation could deceive reasonable consumers about the nature of the charge and, "as a result of this deception, they [could have] expended more money than they otherwise would have but for the misrepresentation."[48] Therefore, the court found that Ehret adequately stated a claim under the UCL's "fraudulent acts" prong.

As for the unfairness prong, the court held that Ehret adequately pled that Uber's representation was unfair by alleging that Uber charged an additional fee on top of its metered fare that Uber intended to keep for its own revenues.[49] The court then examined the CLRA allegations, finding that Ehret adequately pled two violations, relating to representations about the nature of the service to be provided (an app that remits 20% gratuity to drivers) and the obligations of the service provider,[50] but failed to plead violations of two other CLRA provisions that she cited, relating to price reductions and representations made at different times.[51] Given the two properly pled violations of the CLRA, the court also found that Ehret adequately pled an unlawful business practice under the UCL.[52]

On February 23, 2015, the court referred the case to private alternative dispute resolution, imposing a 90-day deadline for completing the ADR.[53]

Conclusions

Given the broad remedial purposes of the UCL and CLRA, California defendants face a difficult battle trying to dismiss UCL and CLRA claims. A UCL fraud claim does not require typical showings of fraud, unfairness standards are seemingly subjective, and claims of unlawful conduct may borrow violations of any federal, state, or local law.[54] And as *Ehret* shows, even where a transaction occurs entirely outside California, a court will focus on the alleged source of injury, which will commonly be California for California-based companies. The case also shows that as companies disseminate more information through websites, e-mail, apps, tweets, and the like, plaintiffs do not need to plead precisely when or on what page they encountered information to plead with particularity. Additionally, *Ehret* demonstrates that plaintiffs can rely on counterfactual allegations to plead economic injury: even where a plaintiff never had an option to pay less than she paid, she can nevertheless plead that she would have done so. Considering these standards for UCL and CLRA claims, it is no surprise that Ehret survived Uber's motion to dismiss.

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[1] Nate Asher is an associate in the New York office of O'Melveny & Myers LLP where he practices in the White Collar Defense and Corporate Investigations Practices. The opinions expressed in this article do not necessarily reflect the views of O'Melveny or its clients, and should not be relied upon as legal advice.
[2] No. 14-cv-00113 (N.D. Cal.). The plaintiff also pled a claim for breach of contract, but that claim was dismissed, and this article does not discuss the breach of contract analysis.
[3] *Ehret v. Uber Technologies, Inc.*, No. 14-cv-00113 (N.D. Cal.), Amended Complaint, Dkt. No. 40 ("Am. Compl.") ¶ 15.
[4] *Id.*
[5] *Id.* ¶¶ 15–16.
[6] *Id.* ¶ 6.
[7] *O'Connor v. Uber Technologies, Inc.*, No. 13-cv-03826 (N.D. Cal.), Complaint, Dkt. No. 1.
[8] *See id.*, Dkt. Nos. 136, 211, 251.
[9] Am. Compl. ¶ 11.
[10] *Id.*
[11] *Id.* ¶ 13.
[12] *Id.* ¶¶ 14–16.
[13] Cal. Bus. & Prof. Code § 17200.
[14] *S. Bay Chevrolet v. Gen Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 878 (1999).
[15] *Nugent v. Fed. Home Loan Corp.*, No. 2:12-cv-0091-TLN-EFB, 2014 U.S. Dist. LEXIS 141029, at *34 (E.D. Cal. Sept. 3, 2014).
[16] *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011).
[17] Cal. Civ. Code §§ 1770, 1761.
[18] *Nugent*, 2014 U.S. Dist. LEXIS 141029, at *34–35.
[19] *See McKell v. Wash Mut., Inc.*, 142 Cal. App. 4th 1457, 1473 (2006).
[20] *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999).
[21] *See id.*
[22] *Plumlee v. Pfizer, Inc.*, No. 13-cv-00414-LHK, 2014 U.S. Dist. LEXIS 121634, at *19 (N.D. Cal. Aug. 29, 2014).
[23] Am. Compl. ¶ 28.
[24] *Id.* ¶ 33.
[25] *Id.* ¶ 39.
[26] *Id.* ¶¶ 48–52.
[27] *Searle v. Wyndham Int'l*, 102 Cal. App. 4th 1327, 1330–31 (2002).
[28] *See id.* at 1334–35.
[29] *Ehret v. Uber Technologies, Inc.*, No. 14-cv-00113 (N.D. Cal.), Notice of Motion and Motion to Dismiss Amended Complaint, Dkt. No. 44 (the "MTD"), at 8–10.
[30] *Id.* at 9–10.
[31] *Id.* at 5–7.
[32] *Id.* at 13–14.
[33] *Id.* at 21.
[34] *Id.* at 14–18.
[35] *Id.* at 19–20.
[36] *Id.* at 20–21.
[37] *Ehret*, 2014 WL 4640170, at *3.
[38] *See Bronson v. Johnson & Johnson, Inc.*, No. 12-04184 CRB, 2013 WL 5731817 (N.D. Cal. Oct. 22, 2013), at *6.
[39] *Ehret*, 2014 WL 4640170, at *4.
[40] *Id.* at *6 (quoting Am. Compl. ¶ 16).
[41] *Id.* at *6–7.
[42] *Id.* at *7.
[43] *Id.*
[44] *Id.* at *7–8.
[45] *Id.* at *8.
[46] *Id.* at *9.
[47] *Id.*
[48] *Id.* at *10.

[49] *Id.* at *9–10.
[50] *Id.* at *10–11 (preserving claims under Cal. Civ. Code §§ 1770(a)(5), (a)(14)).
[51] *Id.* at *11 (rejecting claims under Cal. Civ. Code §§ 1770(a)(13), (a)(16)).
[52] *Id.*
[53] *Id.* at Dkt. No. 96.
[54] *See Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001).

 

Effective Use of Sanctions as a Defense against Federal RICO Claims

***By W. Marion Wilson* [1] *and Sam VanVolkenburgh* [2]**

The temptation to file a civil RICO claim is strong. Besides the possibility of lucrative treble damages, the addition of a RICO claim to a complaint provides strategic litigation advantages, including access to a federal forum, flexible venue options, a justification for sweeping discovery, and a weapon to "shake down [one's] opponent and, given the expense of defending a RICO charge, to extort a settlement."[3]

But filing a RICO claim is not without risk. Various courts have recognized the "potential for abuse by civil litigants," and accordingly, have applied particular scrutiny to RICO claims.[4] Therefore, from a defense perspective, one of the strongest shields against the abusive filing of RICO claims is a sword—the threat of sanctions.

This article addresses the sanctions available to defense counsel in warding off abusive RICO claims. These include Federal Rule of Civil Procedure 11 sanctions, 28 U.S.C. § 1927 sanctions, "inherent power" sanctions, and for extreme cases of litigation misconduct, the "vexatious and harassing litigant" designation under the All Writs Act, 28 U.S.C. § 1651(a). The defendant's goal should be to harness judicial skepticism of RICO claims, and use the threat of sanctions to make plaintiffs think twice before proceeding with their RICO claims.

Federal Rule of Civil Procedure 11

Rule 11 is a powerful tool for discouraging frivolous RICO filings and arguments. Its "central purpose" is "to deter baseless filings in District Court."[5] As the U.S. Court of Appeals for the Eleventh Circuit famously cautioned, plaintiffs must "stop and think" before filing RICO claims, or else run the risk of punishment under Rule 11.[6] "As numerous courts . . . have recognized, Rule 11 is particularly significant in the civil RICO context."[7]

Under Rule 11(b), every person who files a complaint or motion in court certifies that the paper has a reasonable factual and legal basis, and that it was not presented for an improper purpose.[8] A complaint that contains a frivolous RICO claim, or a motion opposing dismissal of such a claim, is likely lacking in a reasonable factual basis, a reasonable legal basis, or both.

From a "factual" standpoint, a plaintiff who contends that he or she has suffered a RICO injury must be able to plead a claim that survives a motion to dismiss. Specifically, the plaintiff must have enough facts to plausibly allege the core of a RICO claim: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[9] With respect to the fourth point, the plaintiff must also have enough facts to plausibly allege the necessary elements of the predicate crimes that qualify as "racketeering."[10] A plaintiff that cannot make these minimum allegations clearly has not made the factual investigation needed to support an assertion that there has been a RICO violation.

However, the pleading deficiencies must be glaring before they give rise to sanctions—"otherwise every complaint dismissed under Rule 12(b)(6) would be sanctionable."[11] As such, the defendant's task in moving for sanctions is to show that the complaint is so deficient that it fails to even approach the threshold of a successful pleading.[12] That being said, where mail- and wire-fraud are the alleged predicate crimes (as they often are), this threshold is raised by the heightened pleading standards of Rule 9(b).[13] Some courts have indicated that the need to meet the Rule 9(b) pleading standard is relevant to whether a plaintiff's pre-filing factual investigation was reasonable.[14]

From a "legal" standpoint, a frivolous RICO claim may be deficient where the facts are alleged in detail, but the plaintiff's theory of a RICO violation is not "warranted by existing law" or by a nonfrivolous argument for extending it.[15] As with deficient factual pleading, there must be more than a demonstration that the plaintiff's legal position was unsuccessful—it must have "absolutely no chance of success under the existing precedent."[16]

Defense attorneys can expect to have a harder time showing a frivolous legal argument as compared to showing a case of insufficient factual investigation. This is partly because courts are understandably reluctant to "stifle the exuberant spirit" of legal advocacy,[17] and partly because RICO doctrine has never been a model of clarity and doctrinal uniformity.[18] As long as the plaintiff can put forward a colorable argument for a "differing interpretation of the law," sanctions will likely not be imposed.[19]

When moving for sanctions based on the plaintiff's frivolous legal argument, defendants should emphasize that the "[m]ere lack of clarity in the general state of some areas of RICO law cannot shield every baseless RICO claim from rule 11 sanctions."[20] The best candidates for sanctions are claims that are deficient in areas where RICO law is clear, such as with respect to the statute of limitations[21] or the elements of the underlying "predicate act" crimes alleged.[22]

Rule 11 will also sanction the filing of a paper for improper purposes. Seldom will there be direct "smoking gun" evidence, so the defendant must rely in large part upon the objective inadequacy of the pleading or argument as circumstantial evidence of bad faith.[23] Other signals of bad faith include a complaint seeking damages far out of proportion to the plaintiff's actual injuries[24] and the filing of amended pleadings that do not cure deficiencies identified in earlier motions to dismiss.[25]

A final point regarding Rule 11 practice: the Rule gives every plaintiff a "safe harbor" in which to avoid sanctions by timely withdrawing its improper paper. This generally gives the plaintiff one free shot at filing a frivolous RICO claim. There is, however, a way for defense counsel to bring this tactic to the court's attention, even if it does not result in sanctions. Defendants should serve their answer, wait 21 days until the expiration of the plaintiff's time to amend the complaint as of right, and then serve a Rule 12(c) motion to dismiss on the pleadings, and simultaneously serve (but not file) a sanctions motion on the plaintiff. The plaintiff will be able to avoid sanctions by amending its complaint, but will have to explain to the court why it is seeking leave to amend.

28 U.S.C. § 1927

Another option for attacking frivolous RICO papers is 28 U.S.C. § 1927, which imposes sanctions on a lawyer who "multiplies the proceedings in any case unreasonably and vexatiously." Section 1927 does not define the term "vexatious," but according to Black's Law Dictionary, "vexatious" means "without reasonable or probable cause or excuse; harassing; annoying."[26] Many circuits interpret this to mean that bad faith is required.[27]

The filing of a court paper in bad faith is, of course, also grounds for Rule 11 sanctions. As discussed above, this can be demonstrated through circumstantial evidence, including the objective lack of merit in the papers filed by the attorney.[28] "The purpose of both Rule 11 and

Section 1927 is to deter frivolous litigation."[29] Thus, a defendant moving for sanctions under Rule 11 should generally also consider asserting a parallel request under Section 1927.

Section 1927 contains one limitation not present in Rule 11 that is notable for purposes of fending off frivolous RICO claims. Some circuits hold that, because Section 1927 punishes the "multiplication" of proceedings, it does not apply to the initial act of filing a frivolous claim.[30] Even in those circuits, however, an attorney can still be sanctioned under Section 1927 for maintaining patently meritless arguments in the face of a motion to dismiss.[31]

Inherent Powers of the Court

In addition to the available statutory or rule-based sanctions options, a defendant can appeal to the court's inherent power to curb abusive litigation. A court may impose such sanctions any time it finds that a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[32] Although commonly seen as a back-up option where other sanctions are unavailable, a court can issue inherent power sanctions even where a parallel sanctions remedy is allowed.[33]

Accordingly, in the event of a frivolous RICO filing, defense counsel should ask for sanctions based on the court's inherent powers, as well as on Rule 11 and Section 1927. Various judicial decisions have awarded sanctions based upon all three grounds.[34]

The "Vexatious Litigant" Label

Where a plaintiff demonstrates a pattern of abusive RICO filings, a defendant may have grounds to ask a court to designate the plaintiff as a "vexatious litigant." Pursuant to the All Writs Act,[35] district courts have the authority to enjoin vexatious litigants from filing court papers, although this sanction has been described as "an extreme remedy that should rarely be used."[36]

In one representative case, plaintiffs filed suit over a simple land boundary dispute and lost at trial and on appeal.[37] They then proceeded over the next ten years to file various duplicative suits, asserting RICO claims against many of the judges and attorneys who had been involved with the earlier dispute. Finally, Chief Judge Marsha Pechman of the U.S. District Court for the Western District of Washington enjoined the plaintiffs from further litigation without leave of court, based on their "pattern of abusive pleadings," including RICO claims that were "facially frivolous" and "patently without merit."[38]

While the vexatious litigant designation is by no means limited to abusive RICO filings, the sudden appearance of RICO allegations, or the repeated filing of RICO allegations against an ever-increasing list of defendants, is often mentioned by courts as justification for the sanction.[39] This may be because the type of litigant who engages in repetitious and abusive litigation is also apt to believe him or herself the target of a vast judicial or political conspiracy.

Conclusion

The guiding principle of sanctions is one of proportionality between the offense and the sanction.[40] Indeed, the U.S. Supreme Court has expressly held that sanctions must be chosen to employ "the least possible power adequate to the end proposed."[41] However, because RICO is such a tempting tool for plaintiffs given that it is a powerful litigation weapon, and its potential for treble damages, defendants are justified in arguing for aggressive sanctions against plaintiffs who file such claims abusively.[42]

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[1] W. Marion Wilson is a senior associate at Morris, Manning & Martin, LLP in Atlanta. He focuses his practice in the areas of commercial and products liability litigation, with a particular emphasis on acting as national coordinating counsel for corporate clients involved in class actions and/or complex, high exposure litigation.

[2] Sam VanVolkenburgh is an associate in the Class Action and Commercial Litigation practice groups at Morris,

Manning & Martin, LLP in Atlanta. He has assisted with the defense of business disputes, tort claims, and related insurance coverage issues.

[3] *Pelletier v. Zweifel*, 921 F.2d 1465, 1522 (11th Cir. 1991).

[4] *Bill Buck Chevrolet, Inc. v. GTE Fla. Inc.*, 54 F. Supp. 2d 1127, 1132 (M.D. Fla. 1999) (quoting *Ste Ame Isorait v. Atlantic Mut. Co.*, No. CV-92-3981, 1993 WL 37330, at *3 (E.D.N.Y. 1993)).

[5] *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990).

[6] *Pelletier*, 921 F.2d at 1522.

[7] *Edmonds v. Seavey*, No. 08 CIV. 5646 (HB), 2009 WL 4404815, at *3 (S.D.N.Y. Dec. 2, 2009).

[8] The text of Rule 11(b) is as follows: "By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."

[9] *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). *See generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[10] *Balthazar v. Atl. City Med. Ctr.*, 279 F. Supp. 2d 574, 590 (D.N.J. 2003).

[11] *Beeman v. Fiester*, 852 F.2d 206, 211 (7th Cir. 1988), *abrogated on other grounds by Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928 (7th Cir. 1989).

[12] *E.g.*, *Henry v. Farmer City State Bank*, 127 F.R.D. 154, 156 (C.D. Ill. 1989).

[13] *Bates v. Nw. Human Servs., Inc.*, 466 F. Supp. 2d 69, 88 (D.D.C. 2006).

[14] *See, e.g.*, *Vuyyuru v. Jadhav*, No. 3:10-CV-173, 2011 WL 1483725, at *24 (E.D. Va. Apr. 19, 2011) ("The extreme vagueness of the plaintiffs' pleading is particularly unacceptable given . . . the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)."); *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 183 (E.D.N.Y. 2010) (plaintiff's failure to satisfy "Rule 9(b) . . . may leave the court with no choice but to impose sanctions").

[15] *See* Fed. R. Civ. P. 11(b)(2).

[16] *Brubaker v. City of Richmond*, 943 F.2d 1363, 1373 (4th Cir. 1991) (quoting *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 987 (4th Cir. 1987)).

[17] *Cleveland Demolition Co.*, 827 F.2d at 988.

[18] *Beverly Gravel, Inc. v. DiDomenico*, 908 F.2d 223, 227 (7th Cir. 1990).

[19] *Red Ball Interior Demolition Corp. v. Palmadessa*, 908 F. Supp. 1226, 1247 (S.D.N.Y. 1995).

[20] *O'Malley v. N.Y.C. Transit Auth.*, 896 F.2d 704, 709 (2d Cir. 1990).

[21] *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 752-53 (7th Cir. 1988).

[22] *Brandt v. Schal Assocs., Inc.*, 121 F.R.D. 368, 387-88 (N.D. Ill. 1988).

[23] *See, e.g.*, *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999) (noting that bad faith can be inferred when the action is "so completely without merit as to require the conclusion [it] must have been undertaken for some improper purpose") (quoting *Schlaifer Nance & Co. v. Estate of Warhol*, 7 F. Supp. 2d 364, 376 (S.D.N.Y. 1998)).

[24] *Donahue v. Matrix Fin. Servs. Corp.*, 110 F.3d 68, 82 (9th Cir. 1997).

[25] *Henry*, 127 F.R.D. at 156.

[26] BLACK'S LAW DICTIONARY (10th ed. 2014).

[27] *E.g.*, *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1544 (11th Cir. 1993); *Shepherd v. Wellman*, 313 F.3d 963, 969 (6th Cir. 2002); *Zuk v. E. Pa. Psychiatric Inst. Med. Coll. of Pa.*, 103 F.3d 294, 297-98 (3d Cir. 1996); *Baulch v. Johns*, 70 F.3d 813, 817 (5th Cir. 1995).

[28] *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997).

[29] *Kapco Mfg. Co. v. C & O Enters., Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989).

[30] *E.g.*, *Jensen v. Phillips Screw Co.*, 546 F.3d 59, 65 (1st Cir. 2008); *Zuk*, 103 F.3d at 297; *DeBauche v. Trani*, 191 F.3d 499, 511-12 (4th Cir. 1999); *In re Keegan Mgmt. Co. Sec. Litig.*, 78 F.3d 431, 435 (9th Cir. 1996); *Peer v. Lewis*, 606 F.3d 1306, 1314 (11th Cir. 2010). *But see Gollomp v. Spitzer*, 568 F.3d 355, 368-69 (2d Cir. 2009); *In re TCI, Ltd.*, 769 F.2d 441, 448 (7th Cir. 1985).

[31] *Steinert v. Winn Grp., Inc.*, 440 F.3d 1214, 1224 (10th Cir. 2006).

[32] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 33 (1991).

[33] *Id.* at 50.

[34] *See, e.g.*, *Byrne v. Nezhat*, 261 F.3d 1075, 1105 (11th Cir. 2001), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *Carousel Foods of Am., Inc. v. Abrams & Co.*, 423 F. Supp. 2d 119, 124 (S.D.N.Y. 2006).

[35] 28 U.S.C. § 1651(a).

[36] *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007).

[37] *Rygg v. Hulbert*, No. C14-237 MJP, 2014 WL 5023627, at *9 (W.D. Wash. Oct. 8, 2014).

[38] *Id.* at *5, *8-9.

[39] *See, e.g., Missud v. Nevada*, 861 F. Supp. 2d 1044, 1060-61 (N.D. Cal. 2012) (plaintiff designated as a "vexatious" litigant who "ratcheted up his litigious conduct in the aftermath of [an adverse] ruling, threatening [the] allegedly 'corrupt' judges with lawsuits . . . . [including] RICO claims against [defendant] for its apparent conspiracy with judges"); *Matter of Peia*, 212 B.R. 217, 219-20 (D. Conn. 1997) (enjoining plaintiff from bringing any action, without leave of court, against the chief bankruptcy judge of the United States District Court for the District of Connecticut, based on concerns that any future claims "would be repetitive of the civil RICO action that was dismissed").

[40] *Bonds v. Dist. of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996).

[41] *Spallone v. United States*, 493 U.S. 265, 280 (1990) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231, 5 L. Ed. 242 (1821)). *See also* Fed. R. Civ. P. 11(c)(4) (sanctions are to be "limited to what suffices to deter repetition of such conduct or comparable conduct by others similarly situated").

[42] *See, e.g., Saine v. AIA Inc.*, 582 F. Supp. 1299, 1306 n.5 (D. Colo. 1984) (emphasizing that frivolous RICO complaints should be met with severe sanctions).

Case Notes

By Michael Bolos [1]

CLASS CERTIFICATION

Tenth Circuit Upholds Class Certification on RICO Claims for Debt Collection Practices.

Sykes v. Mel S. Harris & Assocs. LLC, 2015 U.S. App. LEXIS 2057 (2d Cir. Feb. 10, 2015). Four plaintiffs filed a class action lawsuit alleging that a debt-buying company, a law firm, a process service company, and others engaged in a scheme to fraudulently obtain default judgments against over 100,000 consumers by, in part, improperly serving defendants and relying on affidavits of merit that falsely asserted personal knowledge of the debt records. The allegations claimed that the defendants acted in concert to defraud consumers in violation of the Fair Debt Collection Practices Act, RICO, and state laws. The district court certified two classes, both involving the RICO claims. With regard to the RICO claims, the district court found that plaintiffs had plausibly alleged that "defendants' pursuit of default judgments and attempts to enforce them against plaintiffs proximately caused their injuries, which include the freezing of personal bank accounts and incurring of legal costs to challenge those default judgments."

Defendants filed an interlocutory appeal contesting the grant of class certification. In reviewing class certification, the Tenth Circuit took a close look at the RICO claims to assess whether individualized issues predominated. Defendants argued that if a debt was owed and a default judgment was achieved by means of proper service, a plaintiff cannot actually be an injured party under RICO to the extent that defendants extracted money based on a default judgment. According to defendants, an individual assessment was necessary to determine if the plaintiff had an outstanding debt and whether that plaintiff was properly served prior to default judgment. The Tenth Circuit admitted that "[t]he argument has force," but found that although individual issues may exist, they were insufficient to disturb the district court's grant of class certification.

Defendants also raised the issue of whether private injunctive relief is available under RICO. The district court had declined to decide, at the class certification stage, whether RICO permits private injunctive relief. The Tenth Circuit noted that it has yet to address whether RICO allows for private injunctive relief, but found that, because the district court did not reach the question, the Tenth Circuit would not address the availability of private injunctive relief under RICO at this time.

RICO INJURY

Plaintiff Files a District Court RICO Claim After Losing a State Court Case.

Iqbal v. Patel, 2015 U.S. App. LEXIS 3241 (7th Cir. Mar. 2, 2015). Plaintiff Mir Iqbal purchased gasoline from S-Mart Petroleum for his service station. He hired defendant Tejaskumar Patel to run the station after S-Mart's president, Warren Johnson, recommended Patel to Iqbal. In running the business, Patel did not pay for the gasoline purchased from S-Mart and as a result, Iqbal, who personally guaranteed the debt, was sued in state court for the outstanding balance. After losing the suit, Iqbal filed a federal action claiming Patel and Johnson coordinated to defraud Iqbal in violation of the RICO statute. Iqbal requested that the district court unwind the foreclosure sale that followed the state court's ruling. The district court dismissed the complaint for lack of jurisdiction, because the complaint requested the district court to review the state court's judgment. Upon review, the Seventh Circuit noted an apparent circuit split regarding the ability of district courts to review a state court's decision, finding that, in the Seventh Circuit, "[t]he reason a litigant gives for contesting the state court's decision cannot endow a federal district court with authority." *Id.* at *3. Nonetheless, Judge Easterbrook, writing for a unanimous panel, found that the complaint should be reinstated, because the alleged RICO violation—namely, the coordination to defraud Iqbal—pre-dated the state court's ruling. On remand, the Seventh Circuit advised the district court to assess whether the doctrine of claim preclusion might apply.

FOREIGN ARBITRATION & *RES JUDICATA*

RICO Claims Barred by *Res Judicata* Following Ruling by a Chinese Arbitration Panel.

V Cars, LLC v. Chery Auto. Co., 2015 U.S. App. LEXIS 3469 (6th Cir. Mar. 2, 2015) (unpublished). In 2008 V Cars, LLC filed a complaint alleging that Chery Automobile Company Ltd. ("Chery") violated RICO by routinely bribing or otherwise influencing employees of American car companies to obtain proprietary information about vehicles that could then be produced in China. The action was stayed pending a contractually agreed arbitration, which took place under the auspices of the Hong Kong International Arbitration Centre. In a 124-page decision, the arbitral panel analyzed whether the RICO enterprise was domestic or foreign. Applying the "nerve center test," the panel determined that, although the members of the enterprise met in the U.S. and communicated via a U.S.-based server, the nerve center was in China, because Chery controlled the alleged enterprise from Hong Kong. The panel found that, if the alleged enterprise did in fact exist, it would be a Chinese enterprise, and reliance on RICO therefore would be an impermissible extraterritorial application. The decision dismissed the RICO claims without prejudice and specifically stated that the panel's ruling was "not intended to foreclose any statutory rights that the Claimant may have to pursue a remedy under the RICO statute in a court of law."

Following the panel's decision, V Cars returned to district court and moved for leave to file a second amended complaint. The district court denied the motion for leave under the principles of *res judicata*, finding that any attempt to impose RICO liability was precluded by the arbitral panel's decision. On appeal, the Sixth Circuit noted that the arbitral panel was a court of competent jurisdiction, reached a final decision on the merits of the RICO claim, and therefore the claims were properly denied under *res judicata*. In its decision, the Sixth Circuit reasoned that the arbitral panel ruled on the merits by finding that the alleged RICO enterprise was Chinese and not American, and that the RICO statute does not have extraterritorial reach.

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[1] Michael Bolos is an associate in the Antitrust & Trade Regulation practice group of McGuireWoods LLP.

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